

**DRAFT MEETING MINUTES  
WATER POLLUTION CONTROL ADVISORY COUNCIL  
Friday, February 17<sup>th</sup>, 2017  
Metcalf Building  
1520 E. Sixth Ave, Helena, MT 59620**

**PRESENT**

*Council Members Present:*

*Earl Salley*

*Karen Sanchez (phone)*

*Trevor Selch*

*Michael Wendland*

*Craig Workman (phone)*

*Non-Members Present:*

*Brenda Lindlief-Hall (phone)*

*Ella Smith*

*Montana Department of Environmental Quality Staff Members Present:*

*Emilie Hoffman*

*Myla Kelly*

*Jon Kenning*

*Adam McMahon*

*Melissa Schaar*

*Pete Schade*

*Timmie Smart*

*Amy Steinmetz*

*Mike Suplee*

*Eric Urban*

*Christine Weaver*

*No Members of the Public Present*

**CALL TO ORDER**

Chairperson Trevor Selch called the meeting to order at 10:02 a.m.

**APPROVAL OF AGENDA**

Chairperson Selch moved to approve the agenda. There was no opposition; the motion carried.

**APPROVAL OF MINUTES**

Mr. Selch moved to accept the January 6<sup>th</sup>, 2017 meeting minutes as distributed; Mr. Michael Wendland seconded. There was no opposition; the motion carried.

**BREIFING ITEMS**

**Update on MT Numeric Nutrient Standards Variances**

- Completed by the Department in August 2014.
- Divided into 2 parts: Department rules and Board rules. The board rules went before WPCAC in May of 2014 and were approved by both DEQ and BER.

- February 2015 EPA approved both part A and B of the rules.
- When Montana adopted the nutrients standards we also adopted variance rules to accompany them which allowed dischargers to meet the standards over time.
- August 2015 EPA added more detail to their variance regulations.
- Montana's first variance rules will sunset on July 1<sup>st</sup> 2017. Every three years DEQ has to revisit the wastewater treatment levels. They now have to meet the new federal rules to be in compliance or there won't be a variance available for dischargers.
- In order to do this, DEQ started meetings with the nutrient workgroup. The first meeting was September 2016. Another meeting was held in January 2017 and 2 subcommittee meetings for a more technical group. The work needs to wrap up in May in order to meet the 45-day public comment period, followed by a public hearing, response to comments and ultimately signature by the department head in order to get the variance rules updated by July 1<sup>st</sup>.
- The main issue the group is dealing with is the Highest Attainable Condition (HAC). The federal rules say if you're not going to be able to meet the numeric nutrient standards you have to identify numerically what level you will treat to.
- The HAC includes a cost cap, the limits of technology (LOT) and the permitting method.
- The numbers the workgroup comes up with will be considerably lower than what they are currently – which is 10 mg/L total nitrogen and 1 mg/L total phosphorus for discharges greater than or equal to one million gallons per day and 15 mg/L total nitrogen and 2 mg/L total phosphorus for discharges less than one million gallons per day.
- The time to achieve the HAC is not a fixed number and it will not be expected in the first permit cycle.
- Right now about 40% of permittees need a variance. 30% of permittees don't have reasonable potential and are able to meet their standards at the mixing zone.
- DEQ is not planning on making changes to DEQ 12A, which is the board rule and the actual nutrient standards.

Q: Are the smaller communities aware that these variances are being discussed and will be lowered?

How is DEQ reaching out to these communities that are being most affected?

A: They should be aware of what's going on. The league of cities and towns sits on the workgroup and passes this information back to their members. DEQ has also presented this information at training seminars. It has never been the case that the variance is going away. It will also be in place after July 1<sup>st</sup>. It might look a little different, but once we're through the HAC the ability for facilities to plan for the long haul will be in better shape.

Response: This helps because the communities wonder how they can plan ahead if they don't know what they're planning for.

A: DEQ spent a lot of time making sure information was out there in order to plan and the engineering community has been tied into the meetings from the beginning.

Q: Can you explain a lawsuit that's been filed by the Water Keepers?

A: A lawsuit has been filed against the EPA for their approval of DEQ's standards. The focus is not on the nutrient standards, but the viability and legality of the variance process that was put in place. They say it's too general, can be provided too easily and the treatment levels are too liberal. DEQ has sided with EPA, but DEQ is not being sued directly.

Q: How many other states have implemented numeric nutrient standards?

A: Minnesota, Wisconsin and Hawaii. Most states have some kind but they are often waterbody specific.

Q: Montana's are extremely low. Is this because we're a headwater state?

A: No they aren't extremely low, they are more on par with other states. They are below the practical treatment of wastewater technology levels, but some people have dilution like along the Yellowstone or a larger river.

Q: Are Montana's variances unique? It's not a requirement, is it?

A: I think it is, but the EPA only pushes on State's for different regulations that they're working on.

There were no other questions.

Mr. Selch moved the meeting to the action item.

### **SB325 Variance Rulemaking**

Ms. Myla Kelly started by reviewing the language in SB325. The bill is comprised of 2 parts.

- Part 1: Non-anthropogenic- specifies that the Department cannot apply a standard to a waterbody that's more stringent than the non-anthropogenic (non-human caused) condition of the waterbody. If the standard is more stringent than the condition, then the standard is the non-anthropogenic condition.
- Part 2: The variance – specifies that where a water quality standard is more stringent than the condition of the waterbody, but not a result of a non-anthropogenic condition, then the board shall adopt rules to issue a variance from the standard if certain conditions are met: (i) the condition cannot reasonably be expected to be remediated during the permit term for which the application for variance has been received; and (ii) the discharge to which the variance applies would not materially contribute to the condition.

Ms. Kelly explained how a SB325 workgroup has been meeting monthly since January of 2016 and comprised of many interest groups. There are a number of deliverables that have to be completed in order to initiate rulemaking based on the statute and the workgroup agreed to start with Part 2, or the variance piece, first because it was a bit easier. DEQ has drafted the rule language for Part 2 and how it can be implemented.

Ms. Kelly noted the complexity in Part 1 of figuring out the non-anthropogenic condition. It includes the rule language and supporting guidance or circular, which is the piece the workgroup has focused on and includes the following pieces.

- Part A – Site Specific Criteria (SSC) general method development
  - Demonstration of non-anthropogenic
  - Data needs
  - Selection of criteria
  - Implementation (beneficial use assessments, nondeg implementation, protection of downstream WQS, effluent limit calcs, TMDL calcs, etc)
- Part B – Arsenic specific method for development of SSC. The workgroup decided to lead with this parameter for demonstrating non-anthropogenic.
- Part C or Appendix/Addendum- Madison River Case Study for arsenic
  - Case study for calculating criteria for 3 hydrologic units

Ms. Kelly moved to the draft timeline for both Part 1 and Part 2 to review what the SB325 workgroup has completed for Part 2.

- Drafted the rule language and guidance
- Reviewed both pieces with SB325 workgroup, as well as with the DEQ legal department and EPA

Ms. Kelly explained that DEQ would like to request from WPCAC a recommendation to initiate rulemaking for Part 2.

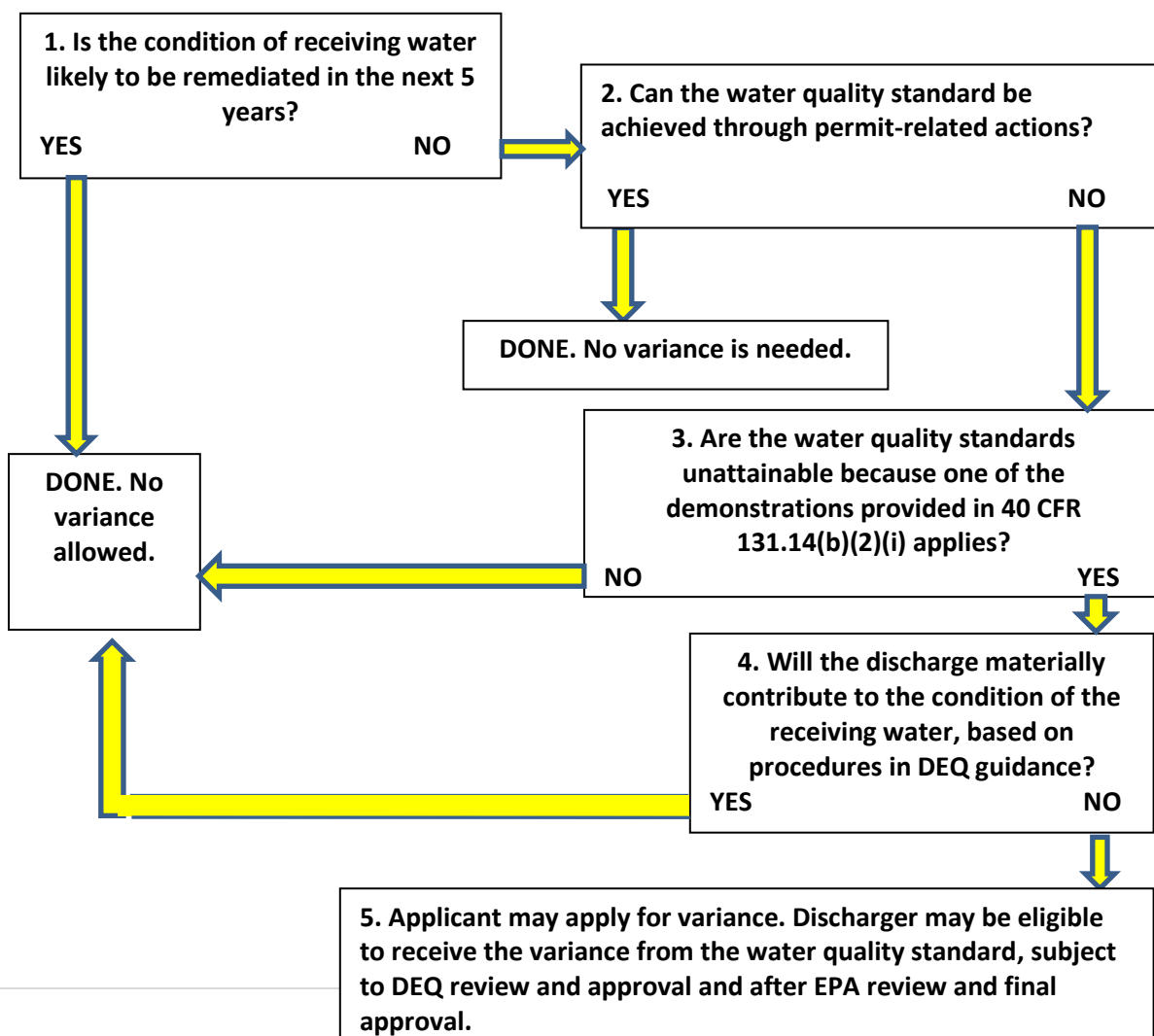
Q: Is there a required timeline to implement a rule when a law is passed?

A: Every bill has a different timeline requirement. This one had a date associated with it which was October of 2015, but as we got into the details of the bill and formed a workgroup we missed that date by some distance.

There were no other questions.

The meeting moved to Dr. Suplee to explain the rule language of Part 2.

Dr. Suplee started by explaining the concept of SB325 – that Part 2 is not about natural pollution conditions, but human caused. He gave the example of a permittee asking why they have to treat for metals to a particularly low level when the stuff coming in upstream is ten times the standard. This doesn't seem reasonable to the permittee unless they remediate at some point. Dr. Suplee walked the council through the flowchart of what an applicant and DEQ need to consider for a variance.



Dr. Suplee detailed the demonstrations in **40 CFR 131.14(b)(2)(i)** in box #3. The EPA will look at these 6 factors, one of which needs to be met in order to receive a variance.

1. Naturally occurring pollutants. This one wouldn't apply because that's Part 1 of the statute.
2. Naturally low-flows (i.e., ephemeral) prevent attainment of the use. Not likely to apply.
3. Human-caused pollution prevents attainment of use and source cannot be remedied or would cause more environmental damage to correct than leave in place. This one might have a role.
4. Dams or other hydrological modifications prevent attainment of the use. Not likely to apply.
5. Natural physical conditions of the waterbody that preclude attainment of aquatic life protection uses. Not likely to apply.
6. Meeting a water quality standard (e.g., DEQ-7) would cause substantial and widespread economic harm. The nutrient standards variance is based on this. Very likely to apply.

Dr. Suplee moved to Figure A in the Implementation Guidance 75-5-222(2) Guidance. The red area, due to historical mining (for example) is the portion of the river not meeting the water quality standard. DEQ can model this and determine if there are point sources in this area. Dr. Suplee moved to Figure B where there is a non-attaining reach shown in red but there is also a point source on it. In this situation a permittee might ask if they need to treat to the underlying water quality standard when the whole river reaches above the standard. They would pursue the variance. In this scenario, the water quality problem ends at tributary 3 because of dilution, or cleaner streams coming in and returning to the water quality standard at that point. These are example scenarios which may or may not materially contribute to the water quality condition and a variance will have to be determined on a case by case basis. Dr. Suplee added that carcinogens and toxics would be given more scrutiny than a harmful parameter like salinity.

Dr. Suplee moved to the next example (**Figure 2-2**) which definitely shows material contribution. He explained how with this case the point source is large enough and has extended non-attainment a considerable distance downstream. DEQ concluded that this would be material contribution and they would not be given a variance. But there are also some gray zones and these will also be considered on a case by case basis.

Q: This might apply more to Part 1, but what if you were to double the flow at the same concentration and tributary 3 was diluting it. Now you've got twice the flow that needs dilution.

A: That is described in the last example (**Figure 2-2**) and is a loading question. If the point source was small and didn't add much to the river, it would eventually dilute out from the other tributaries. But if it's a big load it would manifest further downstream because it can't get diluted out by the other tributaries.

Q: Would the variance go up to the background concentration that the background pollutants levels are at?

A: It depends on which (federal) factor they pursue. If it's factor 6 which is cost, they may be asked to treat between the existing condition and the existing water quality standard or the highest attainable condition. If they pursue factor 3, they would just treat to the background concentration. The applicant can change directions if they find one easier to pursue. A third scenario would be if they are going to materially contribute to the background level, DEQ may have to limit them.

Q: The material contribution is a requirement coming from the State. And the highest attainable condition is described in the numeric nutrient standard variance. Are the variances similar?

A: If the applicant pursues factor 6 which is the one we did with the nutrient standard and is cost based, then under both old and new rules they would still be looking at a cost cap based on DEQ's in-state methods. If the applicant will not be treating to the standard, then how much can they afford to treat to?

Comment: This is a situation many municipalities are in where they are discharging into a waterbody that has been degraded by nonpoint sources. This made me wonder about the similarities between the different variances.

A: We have variance procedures laid out for the nutrients, including individual ones. You don't need to be part of the group variance and you can have one custom fit to your own economic situation, which is how SB325 works.

Ms. Kelly added that there are a couple of different bars that need to be met. There is the federal requirement and the other is the material contribution which is lined out in the state statute.

Mr. Suplee continued with the rest of the rule and Part (5).

- The variance will sunset after 5 years. If DEQ has found no changes in the receiving water, the variance will be extended.
- If there has been some remediation and the waterbody is improving, the permittee will have to match those improvements under their variance. Eventually some type of cleanup will occur and the variance is intended to mesh with these improvements.

Ms. Kelly reviewed.

- Part (1) of the rule is the requirements of the statute.
- Part (2) is federal requirements, excluding (e).
- Part (3) ensures this is the right process you should pursue.
- Part (5) talks about the duration.

Q: In August 2015 when EPA updated their variance regulations, did this rule incorporate them immediately?

A: The federal statute was already in place when we started working on this. DEQ and the workgroup looked at both federal and state statutes.

Q: Will this affect municipalities?

A: Yes, they will probably be some of the main users. Industry will not be a big user because it would be hard for them to meet the federal standards.

Q: So is it redundant to the numeric nutrient standards?

A: No it's completely different. This one is geared more towards metals, historic mining and others that will ultimately be remediated at some point in the future.

Q: If WPCAC votes to proceed with this with the board, what are the next steps? Is it a public process that industry, municipalities and consultants would be able to participate in, similar to the nutrient workgroup and the subcommittee?

A: If we do move forward, March 31<sup>st</sup> is the BER meeting which is when DEQ would request initiation of rulemaking. If the board votes to initiate rulemaking, DEQ files with the secretary of state and the public comment period begins the date the Montana Administrative Register (MAR) notice is published. This would be April 14<sup>th</sup> and the public comment period has to be 45 days long and would end at the end of May/beginning of June. DEQ would then respond to comments and return to the Board to ask for adoption of the rules, likely at the August board meeting. If the board adopts the rules in August, DEQ would then have to submit them to EPA.

Q: In order for BER to initiate the rulemaking process, does it require a recommendation from WPCAC?

A: It's not required, but DEQ has proceeded to the board in the past when WPCAC has recommended they don't, and in both those cases DEQ was unsuccessful.

Q: One comment I got from an engineer is that DEQ should wait to proceed with an additional variance process until the first one gets through EPA.

A: These are individual variances and each one will have to be approved by the board and EPA each time. This is the big difference with the general nutrient variance.

Q: Are you aware of any other states working with this type of variance?

A: Other factor 6 type variances have been granted, but not sure which States.

Q: I was just wondering if you've had other states to go off of.

A: Colorado has done a lot of work along these lines.

Ms. Kelly asked the workgroup about the level of information presented and if it was easy to follow. Mr. Selch said DEQ did a good job presenting it and making it understandable. Mr. Workman thought the written documents were helpful and requested they be available sooner with more time to review.

Mr. Selch requested a motion from the council for DEQ request from the board to initiate SB325 variance rulemaking for Part 2. Mr. Earl Salley made the motion to make a recommendation to initiate rulemaking. Mr. Michael Wendland seconded. No one opposed and the motion carried.

Mr. Workman recommended that the nutrient variance process be kept as a briefing item for future WPCAC agendas.

Mr. Selch asked for public comment. There were none.

Mr. Selch moved to the final agenda item.

### **Agenda Items for Next Meeting**

The next meeting is scheduled for April 28<sup>th</sup>.

- Briefing on the nutrient variance process and explain the status on the rule.
- Briefing on Part 1 of SB325.
- Briefing on Part 2 and the initiating request from the board.
- Briefing of Triennial review update

Mr. Selch looked for a motion to adjourn. Mr. Wendland approved.

The meeting adjourned at 11:33 a.m.